IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NO. 83

United States of America,
Appellant,

v.

The Philadelphia National Bank and
Girard Trust Corn Exchange Bank

MOTION OF GIRARD TRUST CORN EXCHANGE BANK TO AFFIRM

On Appeal from the United States District Court for the Eastern District of Pennsylvania

CARROLL R. WETZEL,
JOHN J. BRENNAN,
MINTURN T. WRIGHT, III,
DECHERT, PRICE & RHOADS,
Of Counsel.

PHILIP PRICE,
1600 Three Penn Center Plaza
Philadelphia 2, Penna.
Attorney for Girard Trust Corn Exchange Bank, Appellee.

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MOTION OF GIRARD TRUST CORN EXCHANGE BANK TO AFFIRM.

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, Girard Trust Corn Exchange Bank moves that the judgment of the district court be affirmed, on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument, because:

1. Section 7 of the Clayton Act does not apply to the proposed merger under the terms of the Act and under settled legal principles enunciated by this Court; and

2. Appellant's failure to prove a violation of section 1 of the Sherman Act appears clearly on the face of the record.

STATEMENT.

Appellees are a national bank and a state bank with headquarters in Philadelphia. On February 24, 1961 the Comptroller of the Currency duly approved the proposed merger of the two banks in accordance with the Bank Merger Act of 1960, 74 Stat. 129, 12 U.S.C. (Supp. II) § 1828(c), but the merger has not been consummated pending the final disposition of this appeal.

Following the Comptroller's approval, appellant filed a complaint in the district court seeking to restrain the merger on the asserted grounds that it would violate section 1 of the Sherman Act and section 7 of the Clayton Act. After a trial the district court entered a judgment dismissing the complaint, and the present appeal ensued.

The record in this case consists of 4,000 pages of testimony and over 300 exhibits accumulated during two months of trial. Detailed requests for findings of fact and conclusions of law and comprehensive briefs were filed and both sides argued the issues orally. The 50-page opinion of the court analyzes all of appellant's contentions, affirms or refuses each one of appellant's 600 requests, and concludes "There is nothing in this record which supports the averments of the complaint. . . ." (J.S. 48a).*

This emphatic conclusion, at the end of such a lengthy trial, accurately reflects the nature of appellant's proof. In the trial court, as in its Jurisdictional Statement here, the appellant placed its primary reliance on mere statistical

* References to appellant's Jurisdictional Statement and Appendix are designated "J.S.". Appellant's and appellees' requested findings of fact which were affirmed by the district court are printed in a Joint Appendix of Appellees. The findings of fact of appellees affirmed by the court are printed at pages 1b to 27b and are designated herein "Def. Fdg.". The findings of fact of appellant affirmed by the court are printed at pages 28b to 77b and are designated herein "Govt. Fdg.". There is also printed as an appendix to this motion, beginning at page 22, a summary of the evidence. References to the transcript of testimony are designated "Tr.".

data which are claimed to demonstrate two things: first, that the four-county area, consisting of Philadelphia and its three contiguous counties in Pennsylvania, is the relevant geographic market; and second, that the merged bank would have a large percentage of the business done by commercial banks which are physically located within that area. From this premise the district court was asked to reach the conclusion that the antitrust laws would be violated by the merger.

Appellant made no serious attempt to show the effect of the proposed merger and of the resulting allegedly undue concentration of assets on the banking or business community either in the four-county area or in any other area. There was likewise no suggestion that a like or greater concentration of banking assets elsewhere has ever produced any adverse effect on competition or on business. There was a total failure to indicate how it might be possible for the merged bank to control loans, deposits, interest rates, availability of credit or any other aspect of banks' activities in Philadelphia or in any other area. The appellant relied merely on the contention, unsupported by testimony or other evidence and contradicted in every material particular by appellees' witnesses, that if certain figures or combinations of figures exceeded a particular amount, a violation of the Sherman and Clayton Acts must have occurred.

The appellant's statistics themselves are so incomplete as to be valueless. They do not even suggest the total volume of banking business done either in Philadelphia or in the four-county area or in any other defined area, nor do they suggest the percentage of such business done either by PNB or Girard. They do not show the amount of business done in the four-county area by banks located elsewhere, nor, while purporting to show local business, do they exclude the business done elsewhere by Philadelphia banks.

Of the three economists whom appellant called to interpret its data (pp. 24-26), two, who had no familiarity with conditions in Philadelphia, and virtually none with banking elsewhere, testified only with respect to their personal theories of banking. The district court found their theories to have been "completely destroyed on cross-examination" and rejected them (J.S. 7a, 36a, 38a-39a). The third economist, the only one acquainted with commercial banking in the Philadelphia area, when asked his opinion whether the merger would have an adverse effect on competition, testified not that competition would be substantially and unreasonably lessened as charged but that "there would still be a considerable amount of competition within the Philadelphia area, knowing the other banks that are doing business following this merger" (Tr. 1609). Appellant's remaining opinion evidence, that of a number of small town bankers who had no knowledge of conditions in Philadelphia (pp. 22-24), was also rejected by the court below (J.S. 7a-8a).

Appellees' proof, on the other hand, included the testimony of a succession of witnesses who were well acquainted with commercial banking in Philadelphia and qualified to gauge the probable effects of the merger. These witnesses included chief executives of seven of appellees' competitors* (pp. 27-28), large and small customers of banking services (pp. 28-31), an economist who had studied Philadelphia banking all his life, a former First Deputy Comptroller of the Currency who also testified on the comparable competitive situation in other cities (pp. 27-28, 30), and public officials of the City of Philadelphia (p. 30). These witnesses testified that the merger not only would not adversely affect competition in the Philadelphia area but would increase it. The court therefore concluded that,

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* Appellant called the president of one Philadelphia bank but refused to let him express his opinion on the effect of the merger (p. 24).

although the competition between Girard and PNB would be eliminated by the merger, "the only competent testimony upon the subject establishes that competition will be more vigorous after the merger" (J.S. 40a).

For the purpose of its decision on the facts the district court accepted every legal conclusion advanced by appellant. Thus the court held that the approval of the merger by the Comptroller under the Bank Merger Act did not preclude the application of the antitrust laws (J.S. 12a-17a). In determining as a matter of fact that the Clayton Act was not violated the court assumed that section 7 of the Act was applicable, even though it held to the contrary as a matter of law (J.S. 17a-21a). The court held that commercial banking as a whole was a proper line of commerce or product market, as argued by appellant (J.S. 24a-28a). The court assumed that the four-county area espoused by appellant was the relevant geographic market in which to measure the competitive effects of the merger, even though it held that the relevant market encompassed a much larger area (J.S. 29a-31a). The court assumed that appellant's concentration percentages for the four-county area had significance, even though it adopted a finding of fact as to their invalidity (J.S. 34a-35a; Def. Fdg. 56, p. 9b). Finally, the court analyzed the effect of the merger on competition without including the benefits which would result, even though the court was "convinced that the merger will definitely benefit the community" (J.S. 34a, 48a; Def. Fdgs. 190-207, pp. 25b-27b).

The factual basis for the decision of the court below appears from the opinion (J.S. 46a-47a):

> "The Government has asked this Court, without the production of a single shred of evidence, and on the basis of reports no more illuminating than that of the Comptroller of the Currency, to give legal effect to the conclusions of the dissidents, rather than the Department charged with the responsibility.

"This Court fails to see how any court, without some factual basis being laid therefor, could accede to any such request and this is all the more true in this particular case where experienced, substantial bankers throughout this entire area have appeared in open court, subjected themselves to searching cross-examination, and have unanimously demonstrated that the proposed merger would not cause an undue concentration of banking, would not tend toward a monopoly, and definitely would increase the vigor of competition which the Congress of the United States from the passage of the Sherman Act down to the present date has, by law, attempted to foster."

The trial judge accordingly concluded on the basis of the entire record before him that appellant had failed to prove any violation either of section 1 of the Sherman Act or of section 7 of the Clayton Act, even assuming its applicability.

ARGUMENT.

Summary of Argument.

In order that the judgment of the court below be affirmed, it is necessary to conclude only that: (1) section 7 of the Clayton Act is inapplicable and (2) appellant has failed to prove that the proposed merger of these two Philadelphia banks will constitute a violation of section 1 of the Sherman Act. These propositions are so clearly correct that further argument before this Court is unnecessary.

The inapplicability of section 7 of the Clayton Act is established by the plain language of the Act, by this Court's opinion in *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission,* 291 U.S. 587 (1934), by the legislative history of the amended Act and of the Bank Merger Act of 1960, and by opinions of former Attorneys General.

With respect to section 1 of the Sherman Act, this Court has held that an injunction should be granted only upon "a definite factual showing of illegality." *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 377 (1933); *Times-Picayune Pub. Co.* v. *United States,* 345 U.S. 594, 622 (1953). As opposed to this standard, the district court has found that "there is nothing in the record" and, again, there is not "a single shred of evidence" which supports the averments of the complaint (J.S. 48a, 46a). The findings of the trial court should not be set aside unless clearly erroneous. F. R. C. P. 52(a).

The pendency of bank merger cases in cities other than Philadelphia does not require a full hearing of this appeal. The appellant simply failed to prove its case with respect to Philadelphia, in which the banking situation is different than it is elsewhere. Other cases will not be decided by the failure of proof here.

On the basis of testimony of representative bankers, businessmen, and the Mayor of Philadelphia, the district

court found that the proposed merger would increase banking competition in and be of definite benefit to the Philadelphia area and would not lessen banking competition anywhere. Accordingly affirmance of the judgment will promote the purposes of the antitrust laws.

I. Section 7 of the Clayton Act is not Applicable to the Proposed Merger.

Section 7 of the Clayton Act, as amended by the Celler-Kefauver Anti-Merger Act of 1950, 64 Stat. 1125, 15 U.S.C. § 18 (1958), provides in pertinent part:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Banks are not "subject to the jurisdiction of the Federal Trade Commission". Federal Trade Commission Act § 5(a)(6), 38 Stat. 719, as amended, 15 U.S.C. § 45(a)(6) (1958). Thus section 7 applies only to stock acquisitions by banks and not to asset acquisitions.*

The proposed merger is to take place pursuant to section 215 of the national banking laws, 73 Stat. 460, 12 U.S.C. (Supp. III, 1962) § 215, which provides in subsection (e):

> "The corporate existence of each of the consolidating banks or banking associations participating in

* Under the Bank Merger Act the Comptroller of the Currency approved this merger and the Federal Reserve Board had merely an advisory function. If bank mergers such as this constitute stock acquisitions, the Federal Reserve Board would also have had authority under Section 11 of the Clayton Act, 38 Stat. 734, as amended, 15 U.S.C. § 21 (1958), to set aside the merger.

such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer."

In its effort to have section 7 of the Clayton Act applied to this merger, appellant argues that the merger involves first an acquisition of stock and then an acquisition of assets (J.S. 31). This, however, is directly contrary to the facts. Both the language of section 215(e), quoted above, and the terms of the agreement between the two banks show that the proposed merger does not involve an acquisition of stock (J.S. 17a-21a; Def. Fdg. 8, p. 2b).

Appellant's argument is also in conflict with well settled principles. In *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Commission,* 291 U.S. 587, 596, 598-9 (1934), this Court construed the same language which appellant seeks to invoke here and ruled that a merger is not an acquisition of stock under section 7 of the Clayton Act. Although the decision of that case was by a divided court, the dissenting opinion of Mr. Justice Stone agreed (at p. 600) that "It is true that the Clayton Act does not forbid corporate mergers . . ."

A subsequent attempt by appellant to attack a merger as a stock acquisition under section 7 of the Clayton Act was rejected by the District Court for the Southern District of New York, following "the clear mandate of the Arrow-Hart decision." *United States* v. *Celanese Corp.,* 91 F. Supp. 14, 16 (S.D. N.Y. 1950). In that case it was

said (at p. 17) that "Section 7 was not intended to apply to the acquisition by one corporation of the assets of another or the open uniting of the property of two or more corporations by legitimate reorganization, consolidation or merger."

Although the language of section 7 which this Court construed in the *Arrow-Hart* case was not changed by the 1950 amendment, and the additional clause relating to asset acquisitions was made inapplicable to banks, appellant now seeks to argue that section 7 has always applied to mergers as well as to stock acquisitions, relying on a quotation from *United States* v. *duPont & Co.*, 353 U.S. 586, 590 (1957) (J.S. 30). This Court decided in the *duPont* case only that section 7 had always applied to vertical as well as horizontal stock acquisitions. The decision had nothing to do with the holding of the *Arrow-Hart* case that a merger is not a stock acquisition within the meaning of the section.

Appellant's present argument is contrary to the position the Department of Justice has consistently taken since 1950. In the course of unsuccessful efforts to persuade Congress to amend the Clayton Act to accomplish the result which the appellant now seeks to achieve by means of a decision of this Court, Attorneys General have repeatedly stated to Congress that section 7 does not apply to bank mergers.* For example, during the first hearing

* *Hearings Before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957, 85th Cong., 1st Sess., Part 2*, at 1030, 1033 (1957); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 85th Cong., 1st Sess., Ser. 2*, at 13, 49, 72 (1957); *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, Part 1*, at 244, 266 (1955); *Hearings on S. 3911 Before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess.*, at 61, 66 (1956); *Hearings Pursuant to S. Res. 231 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 85th Cong., 2d Sess.*, at 182 (1958); *Hearings on S. 1062 Before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess.*, at 9 (1959).

cited in the footnote, Attorney General Brownell, speaking of bank mergers, told the Senate Committee on Banking and Currency that:

> "On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by section 7 as amended in 1950."

Even more significantly, in passing upon an application for informal clearance of a bank merger in 1955, the Department of Justice stated:

> "After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act. For this reason this Department does not presently plan to take any action on this matter."*

Congress itself has recognized that the stock acquisition clause of the Clayton Act does not apply to corporate mergers. The reports on the 1950 amendment of section 7 of the Act stated that the addition of the clause dealing with the acquisition of assets was necessary to change the existing law, which failed to prohibit acquisitions of assets by merger or otherwise. *H. Rep. No. 1191, 81st Cong., 1st Sess.*, 5, 11-12 (1949); *S. Rep. No. 1775, 81st Cong., 2d Sess.*, 2 (1950). The House Report said at page 12 with respect to the decision in the *Arrow-Hart* case:

> "Since the Commission could take action only against those asset acquisitions that were preceded by stock acquisitions, the possible reversal of decisions would in no way give the Commission the power to prevent those acquisitions of assets which do not involve the transfer of stock. No one has ever contended that the

* *Hearings on Current Antitrust Problems Before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 3,* at 2141 (1955).

acquisition, under any possible construction of section 7, lies the power to prevent this latter type of acquisition."

The legislative history of the Bank Merger Act of 1960 further reveals Congress' view that section 7 is inapplicable to bank mergers. In the report of the House Committee on Banking and Currency, *H. Rep. No. 1416, 86th Cong., 2d Sess.* (1960), it is said at page 9:

"Because section 7 is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers 'little help,' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers."

In the report of the Senate Committee on Banking and Currency on the same Act, *S. Rep. 196, 86th Cong., 1st Sess.* (1959), it is said at page 5:

"In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section, in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected)."

In view of the foregoing appellant's contention with respect to the applicability of section 7 of the Clayton Act is insubstantial and does not require further argument before this Court. More especially is this so since the trial court assumed arguendo that the Clayton Act was applicable and then found as a fact that it had not been violated.

II. Appellant's Failure to Prove a Violation of Section 1 of the Sherman Act Appears Clearly on the Face of the Record.

Appellant's evidence was directed not to the extent or nature of existing competition or the effect the proposed merger would have on it, but merely to the total volume of the merged bank's business. Relative concentration of banking business following the merger was shown in the abstract, without any evidence that such concentration would adversely affect competition or that greater concentration, which was shown to have existed elsewhere for many years, has ever had that effect. Essentially appellant complains that the district court did not find, contrary to the only credible evidence in the case, that the numerical relationships that would exist after the merger would inevitably lessen competition and tend to create a monopoly in commercial banking in Philadelphia.

By calling the banks involved "two giant banks" (J.S. 22), by repeating the words "concentration" and "undue concentration," and by calling the business expected to be done by the merged bank "controlled" (J.S. 22), appellant obscures the absence of any evidence that the merged bank would in fact be able to control or limit the availability of credit or banking services in any way in any defined area, or affect in the slightest degree the ability of all banking customers in any area to obtain any banking accommodation they wish. By professing to find the antitrust laws rendered "impotent" by the decision of the district court (J.S. 13), appellant distracts attention from the affirmative evidence on which that decision was based and which shows that the merged bank itself would be impotent to impose its will on any other bank or on any customer of a bank, would be totally unable to restrict the freedom of action of its competitors or their customers, and would be wholly without power, either actual or potential, to lessen

competition or to create a monopoly even if it desired to do so (J.S. 36a-37a, 40a-41a). It was because the district court looked beyond the mere verbal characterizations offered by appellant that it was able to find, on the basis of the extensive evidence presented by the appellees (pp. 27-31), that competition not only would not be lessened but would actually be increased by the merger (J.S. 37a-39a).

Theories are no substitute for facts; mere labels do not supply a sound foundation for a court's judgment. Concentration in banking, great or small, without evidence of its effect, if any, on competition is meaningless. Appellant suggests no standard against which the size of banks may be measured in order to determine their ability to affect competition. Ratios alone do not furnish a reliable test for the power of banks to compete with one another. Violation of section 1 of the Sherman Act does not exist nor does competition in banking inevitably disappear and a tendency toward monopoly arise merely because one bank out of 41 is larger than any of the others in the Philadelphia area. All this has been made abundantly clear by *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-8 (1948) and by *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), to name but two cases, and yet appellant seeks to prevent this merger merely because the merged bank will have a particular position in an arbitrary scale.

Whatever mere size may mean in any other business or whatever ability to control or influence the market size may have elsewhere, it has no such quality in banking because of the nature of that industry. Banks are dependent for funds with which to operate on the will, or whim, of their depositors. They do not own the funds they lend, they owe them, and are regulated to such an extent that competition among banks is, for practical purposes, restricted to service and limited by their capacity, closely controlled by law and regulation, to meet the requirements of the customer (J.S. 8a, 22a-24a; Def. Fdgs: 9-37, pp. 2b-5b).

Words and phrases used to describe competitive conditions and activities in manufacturing and selling are inapplicable to banking and their uncritical use is merely misleading. An example of this is the appellant's reference (J.S. 24) to "economic power and influence" of banks competing for modest loans as if that were a product of a bank's size. The record in this case clearly established this not to be the fact and the district court so found (J.S. 36a-37a).

Concentration* in banking is referred to as if it were something evil in itself, and yet no attempt was made to give it a precise meaning or even to show how it is harmful. Many cities were shown to have banks with greater percentages of local banking resources than the merged bank would have (Def. Fdgs. 132-139, pp. 16b-17b), yet not a word of testimony was offered to indicate that competition has been lessened in any such city. Appellant brought witnesses from small towns as far west as California to tell of their limited experience in banking (pp. 22-24), but offered not a single witness from any of the cities with concentration in banking equal to or greater than that predicted for Philadelphia to describe the effect, if any, of that concentration. Merely calling concentration "undue" (J.S. 25) proves nothing without evidence that the concentration complained of has lessened competition in the past or may be expected to do so in the future.** There was no such evidence in this case and there was much the other way (p. 30). There is simply no substance to appellant's assertions that the allegedly undue concentration proves something.

* As generally used by appellant the term "concentration" appears to mean the percentage of banking resources in a particular locality held by a bank or banks. See Govt. Fdgs. 374-384, pp. 64b-66b.

** One of the few available studies of banking competition is found in the Annual Report of the Federal Deposit Insurance Corporation for 1960 (Ex. D-48). That report says (at p. 59) that ". . . there is no fixed relationship between changes in concentration and changes in competition."

All that appellant's argument really amounts to is that the competition presently existing between PNB and Girard would be eliminated (J.S. 19). That this alone is not enough is shown by *Appalachian Coals, Inc.* v. *United States*, 288 U.S. 344, 360 (1933), *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948) and *Erie Sand & Gravel Co.* v. *F. T. C.*, 291 F.2d 279, 283 (3rd Cir., 1961).* The elimination of the competition between PNB and Girard would be significant only if this might have some adverse effect on the ability of the public to obtain proper banking accommodation. The evidence clearly shows that it would not. Not only will there still be 41 banks in the Philadelphia area after the merger, but three was the largest number of alternate choices said by any witness to be necessary to provide every competitive advantage to a prospective borrower, and the district court so found (J.S. 39a; Def. Fdg. 159, p. 20b). Obviously the other major customer, a depositor, can go anywhere.

The merger would reduce the number of Philadelphia banks able to lend more than $5,000,000 from three to two (J.S. 39a). However, for the first time a Philadelphia bank would be able to lend more than $8,000,000 and thus compete with the many banks in other cities, particularly New York, which are taking from Philadelphia business that Philadelphia banks cannot now handle (J.S. 48a). The evidence shows that for loans over $1,000,000 a borrower can and frequently does go to a bank in some city other than Philadelphia and that New York banks are constantly seeking and obtaining business in Philadelphia (Def. Fdg. 52, pp. 8b-9b; J.S. 30a-31a). Barring the proposed merger would accordingly have no appreciable impact on competition in the Philadelphia area but would effectively prevent the creation of competition which does not now exist

* The railroad and coal cases relied on by appellant (J.S. 20-21) were not considered controlling even in *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 531 (1948) and they have no application here.

and would preserve for the benefit of the larger banks in New York and elsewhere the substantial volume of large business which no Philadelphia bank is big enough to do (J.S. 48a). Although professing to be concerned lest the proposed merger lessen competition, what the appellant is seeking would actually stifle competition, not preserve or increase it.

The statistics furnished by the appellant fail to give the most elementary data necessary to determine the effect of the merger in any market, even the four-county area urged by appellant. There is nothing to show the total volume of banking business done within that area, or the percentage of that business done either by PNB or Girard (Def. Fdg. 56, p. 9b). There likewise is nothing to indicate the business done within the area by banks outside it or the total banking needs of customers, both within and without the area, who look to banks within it for their banking accommodation. The percentage of PNB's or Girard's own business done within the area signifies nothing with respect to competition unless there is also shown what percentage of the total business done in the area is done by each of those two banks. The fact that Philadelphia banks may establish branches only in the four-county area sheds little light on banking competition in that area (Def. Fdg. 48, p. 7b). Appellant's statistics, limited to the four-county area to show the largest possible percentage of certain types of business, are incomplete and misleading and may not validly be related to the percentages considered in the industrial and commercial cases on which appellant relies (J.S. 19 fn. 14, 20-21).

Appellant complains that the district court did not accept the views given to the Comptroller by the Attorney General, the Federal Reserve Board and the Federal Deposit Insurance Corporation (J.S. 20); but the district court considered them and concluded that they were an inadequate substitute for the evidence in the case (J.S. 45a-47a).

The statement that the proposed merger will alter the existing competitive situation (J.S. 7, 23) gains no strength from repetition. Appellant's proof simply fails to provide any basis for an informed finding that the proposed merger would lessen competition. Its attempt to sustain its burden in this regard failed* (J.S. 6a-8a) and the district court accepted instead the testimony of appellees' informed and experienced witnesses that competition would be increased by the merger. This evidence came from businessmen and bankers of the area who were best able to express an opinion on the subject (pp. 27-30).

The chief executives of seven smaller competitors of appellees testified that the increased size of the merged bank will not affect their ability to compete after the merger. Their testimony was unanimously supported by businessmen of the area and was contradicted by no one (pp. 27-30).

Expert opinions that the merger would not adversely affect competition were expressed both by an economist who was fully acquainted with commercial banking in Philadelphia and Pennsylvania and by a former First Deputy Comptroller of the Currency, who had comprehensive knowledge of banking conditions throughout the United States (pp. 27-28, 30).

The evidence demonstrates that past mergers have not affected the ability of commercial banks of all sizes in Philadelphia to compete effectively and to grow (Def. Fdgs. 108-122, pp. 12b-14b). Appellant emphasizes (J.S. 7) the fact that the number of commercial banks with head offices in the four-county area has diminished in the last 15 years. Appellant offered no evidence that the earlier number was the proper number or that the present number is inadequate. Appellant's only expert witness who was fa-

* This is a "not uncommon form of litigation casualty, from which the government is no more immune than others." *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949).

miliar with banking in the Philadelphia area testified that these mergers resulted from the needs of the four-county area and of its banks and were beneficial to the community and that competition is more vigorous now than it was 10 years ago (pp. 25-26).

Appellees' witnesses uniformly and emphatically stated that concentration *per se* is without significance and has no effect on banking competition or the ability of banking customers to obtain accommodation. Percentages for other cities show that even after the merger Philadelphia would rank far below the top of the list in the share of total bank assets held by its largest or its five largest banks (Def. Fdgs. 132-139, pp. 16b-17b). It was testified that each one of these other cities enjoys the benefits of vigorous banking competition, and there is not one word of testimony to the contrary (p. 30).

Appellant has ignored the essential fact, recognized by its only qualified expert witness (pp. 25-26), as well as by appellees' witnesses, that the growth of banks by merger is largely a product of the demand of larger business enterprises for increased banking accomodation, which has far outstripped the banks' natural growth. Appellant's suggestion that appellees are large enough for the business available (J.S. 25 fn. 18) was refuted by the evidence and rejected by the district court (J.S. 48a; Def. Fdgs. 177-180, pp. 22b-23b). Appellees showed the effect that larger resources would have, not only on the ability of the merged bank to attract and serve large customers in its own area, but also on its ability to continue to serve adequately expanding business customers of all sizes. They demonstrated the present need for a bank large enough to meet the requirements of the large enterprises and particularly the smaller expanding ones within the Philadelphia area (Def. Fdg. 179, p. 23b). It was also shown that a merger is the only feasible manner of achieving this result (p. 31; Def. Fdg. 189, p. 25b).

The fundamental theory of the appellant would result in banks being kept small irrespective of the demands made upon them. The incapacity of Philadelphia banks to care for the business needs of the community has produced a great flow of banking business to New York (pp. 29-30). The far greater size of New York banks makes it impossible for any Philadelphia bank to compete with them adequately for large business. If appellant's purpose in this case is accomplished that disparity will be preserved and the development of a healthy competition between New York and Philadelphia will be prevented.

The proposed merger is the first major effort to provide a Philadelphia bank which can be truly competitive with the larger banks in New York and other cities. The record shows how many cities smaller than Philadelphia have larger banks (Def. Fdgs. 181-182, pp. 23b-24b) which presently draw business from the Philadelphia area. To prevent the creation of a bank which could offer real competition in this field is to defeat, not to promote the purposes of the antitrust laws. This is particularly indefensible in the absence of any evidence whatever that local competition will be served thereby. All demands for smaller accommodation can be met more than adequately by the banks which will continue to serve the area after the merger. Demands for larger accommodation can be met for the first time in Philadelphia by the merged bank, competitively with large banks elsewhere. The evidence shows and the district court found that the only effect that preventing the merger will have on competition will be to inhibit it (J.S. 48a).

CONCLUSION.

There is no significant question presented by this appeal which requires review. The fact that the decision of the district court is the first ruling in a case brought

by the appellant to restrain a proposed bank merger does not change its inherent character. The decision was based on an evidentiary determination of the particular facts of this specific case following a thorough analysis of extensive evidence. That appellant's theories were found to be unsupported even by appellant's own evidence deprives those theories of any significance here.

The decision of the district court was a necessary consequence of appellant's failure to prove its case. The judgment below is correct, and there is no question which requires further consideration.

Respectfully submitted,

PHILIP PRICE

CARROLL R. WETZEL

JOHN J. BRENNAN

MINTURN T. WRIGHT, III

Attorneys for Appellee

Girard Trust Corn Exchange Bank

SUMMARY OF EVIDENCE.

To support its contentions the appellant called as witnesses nine bankers unconnected with the appellees, of whom only one, Sienkiewicz (Tr. 2051), knew anything about Philadelphia and only one other, Brumbaugh (Tr. 643), knew anything about Pennsylvania. A third, MacMillen (Tr. 1217), was familiar with practices in New York, but the other six, all from small communities, were totally ignorant of conditions in Philadelphia and were apparently called mainly because of their opposition to mergers as such, which is the party line of the Independent Bankers Association (Ex. G-66), and their desire to participate in any anti-merger activity (Tr. 742, 744, 747-749).

Of these witnesses Clarke, president of Citizens Union Bank and Trust Co., of Lexington, Kentucky, population 125,000 (Tr. 376), said that there are five commercial banks in Lexington, a number which he considered ample since customers may go where they choose (Tr. 376, 393).

Forlines was president of the Bank of Granite, Granite Falls, N. C., population 3,000 (Tr. 401, 424), which, in spite of competition from larger banks, has quadrupled its assets in the last ten years (Tr. 426, 428). His business experience was revealed by his statement that no one in his area would know what to do with a million dollars (Tr. 430).

Brumbaugh was president of the First National Bank of Claysburg, Pennsylvania, population 3,000 (Tr. 643, 676). He had not supervised any merger of Philadelphia banks while he was Secretary of Banking (Tr. 676) and declared himself not qualified to express an expert opinion on the proposed merger (Tr. 658, 664, 669-671). His definition of a monopoly was four or five banks controlling the whole State of Pennsylvania (Tr. 693) and he did not consider that the proposed merger would affect banking in Pennsylvania to any great extent (Tr. 665). He also

took the defeatist view that there would be no benefit from the merger since New York banks were so much larger (Tr. 681).

DuBois, president of the First State Bank of Sauk Center, Minn., population 3,500 (Tr. 728), headed a family owned bank which has prospered in competition with a large bank (Tr. 730-732). He believed that a borrower should have at least two banking alternatives (Tr. 725) since there would be no monopoly with two banks in vigorous competition (Tr. 732). Having sat in the courtroom for a week he declared himself sufficiently well educated to express an opinion about banking in Philadelphia (Tr. 722).

Hansen was president of the Bank of Union County, Elk Point, S. D., population 1,500, which has a lending limit of $40,000 (Tr. 733, 743). He conceded that nearly half of the IBA banks are the only bank in town (Tr. 746) and said that officers and employees of small banks were bewildered when acquired by merger (Tr. 745-746).

Harding, president of the First National Bank of Pleasanton, Cal., population 4,000 (Tr. 1041), runs a family owned bank (Tr. 1003, 1022). Although his bank takes business from and competes vigorously with a branch of the Bank of America in Pleasanton (Tr. 1013, 1024, 1029, 1031) and has grown substantially in the last ten years (Tr. 1023), he said that competitive banking meant competition with another independent bank without interference from a large number of competitors nearby (Tr. 1020). His opinion was that there would be no monopoly with six banks in a city (Tr. 1037).

Taylor was president of the Waukesha State Bank, Waukesha, Wis., population 30,000 (Tr. 1280, 1304). Although not familiar with loan business in Philadelphia (Tr. 1287) and unable to indicate how the merger of PNB and Girard would restrict competition, except by eliminating one bank (Tr. 1303), he considered that the PNB-

Girard merger would have an effect in his area (Tr. 1300-1301). His bank has grown in competition with a much larger bank (Tr. 1306-1307).

MacMillen, former president of Colonial Trust Co., New York, testified about his experiences in New York but did not know the volume of business done by New York banks in the Philadelphia area or the banking needs of that area (Tr. 1245-6). His bank had competed successfully for loans during the period of mergers of large New York banks (Tr. 1273-4). He agreed that there is no rate competition for large borrowers (Tr. 1260-1) and that prime customers cannot be charged more than the prime rate (Tr. 1257). He also recognized the undesirability of making loans up to a bank's lending limit and agreed that a bank with a larger lending limit and more capital could take a greater risk and therefore lend more than could a small bank (Tr. 1267-9).

The last banker called was Sienkiewicz, president of Central Penn National Bank, the only Philadelphia banker of the nine. He testified that competition from New York is very strong (Tr. 2064). He said that his eighteen branches are important to maintain his bank's competitive position since it has to serve its customers wherever they are, that size is immaterial in competition for deposits, that competition in Philadelphia is keener than it used to be when there was a larger number of banks (Tr. 2057, 2063-4), that there is no price competition for loans (Tr. 2060-1, 2073-5) and that service charges are not an important factor (Tr. 2059, 2065-8). His bank's business comes from the Philadelphia area, including New Jersey (Tr. 2062). The appellant was unwilling to disclose Sienkiewicz's opinion about the proposed merger (Tr. 2062, 2075-6).

The bankers whom the appellant called furnished no support for its charges and theories.

In addition to the bankers the appellant called three professors, who likewise failed to give any support to the appellant's contentions.

Professor Smith, of the University of Michigan, had no business experience (Tr. 434-446) and had made no prior study of banking in the Philadelphia area (Tr. 555). He relied not on data about Philadelphia but on national figures (Tr. 504, 519, 523, 530, 532). He was uninformed about the Philadelphia area and had no basic information about banks or banking in the four county area (Tr. 555-62). In reaching his conclusion he discussed the problem not with any Philadelphia banker (Tr. 562) but with other professors and researchers (Tr. 550-3). On the basis of assumptions, without regard to the facts (Tr. 565-6, 3953, 3992) and rejecting the evidence of Ex. D-26, D-40 and D-43 (Tr. 3935, 3971-2, 3976-7, 3984) he sought to determine the effect of the larger loan limit of the merged bank on the availability of credit in Philadelphia (Tr. 564, 565, 571, 581-2, 3984, 3992). Relying on an algebraic formula (Ex. G-60), which was "kind of hard to follow" (Tr. 583), he concluded that the increased lending limit of the merged bank would not increase loanable funds but that the reverse would occur (Tr. 616, 3942, 3951, 3953, 3960-1). He had never traced the disposition of a large loan or participated in making one (Tr. 3943, 3946), and his conclusion was dependent on the assumption that 97% of the proceeds of local loans resulting from new credit lines would leave the area (Tr. 3980). He indicated that his mission was merely to refute the contention of the banks made in the Application to the Comptroller (Ex. G-57) that the larger lending limit of the merged bank would bring additional funds into and therefore benefit the Philadelphia area (Tr. 3951).

Professor Keith, of the University of Pennsylvania, had made a study of branch banking in the four-county area in 1956 and 1957 (Tr. 1539, 1541). Unlike the two other professors, he had based his study largely on discussions with bankers in the four-county area (Tr. 1569). He concluded that mergers resulted from the need for

ing facilities in the surrounding counties that the small suburban banks were unable competition (Tr. [illegible]) and that mergers to the community and had increased com- [illegible] [illegible]. He said that banks [illegible] [illegible] [illegible] must keep up with the s in other cities (Tr. [illegible]) and that there a lending capacity because banks could not the growth of business (Tr. [illegible]). He price competition a major factor among [illegible] and that mergers with Philadel- [illegible] increased the competition in the three [illegible] (Tr. [illegible]) and conceded that a e number of competing banks need not competition (Tr. [illegible]). He said that the [illegible] of PNB and Girard do not overlap d that a considerable amount of competi- [illegible] would still exist after the proposed [illegible].

[illegible], of Northwestern University, was [illegible] in opposition to the bank merger two he had any opinion on the subject (Tr. could not qualify as an expert on banking s (Tr. [illegible]). He based his opinion on [illegible] and discussions with teachers and [illegible], but had none with any bankers in Philadelphia (Tr. [illegible]). He adopted [illegible], being wholly ignorant of condi- [illegible] (Tr. [illegible], [illegible], [illegible], 1832, -4, [illegible], [illegible], [illegible]). His testimony was [illegible] (Tr. [illegible], [illegible]) and he [illegible] (Tr. [illegible], [illegible], [illegible], 2030, [illegible]. The appellant displayed so little con- [illegible] that he was relied upon as an- [illegible] [illegible] requests for findings of [illegible] and [illegible].

The other witnesses called by the appellant were officers of the two banks: Beadle testified about branches (Tr. 804); Worstall, branches (Tr. 1041); Ridgway, service charges (Tr. 1124); Gillam, service charges (Tr. 1308); Beatty, credit information (Tr. 1316); Potts, general operations of PNB (Tr. 1331); Satterfield, consumer credit (Tr. 2079). Their testimony was in the nature of discovery, and much of it had little or no relation to the issues in the case.

This was the testimony offered by the appellant. Its additional evidence consisted of quantities of statistics in the form of exhibits showing numbers, amounts and percentages, the volume of selected classes of business from various selected areas, the number and location of branches and their volume of business, service charges, interest rates and other incidental items, and the supposed relative position of PNB and Girard in various classes of loans, deposits, assets, sources of business and other miscellaneous bases of comparison. There were also numerous letters, memoranda, papers, reports and other documents which were identified and offered in evidence, and most of which were never referred to again.

The appellees' evidence, after explaining the background of and the need for the merger, was directed toward two propositions: (1) competition would not be lessened by the merger in the Philadelphia area and competition presently non-existent would be created beyond that area; and (2) the resulting increase in concentration is both reasonable and necessary to provide business in the Philadelphia area with the banking accommodation to which it is entitled but which now it has to seek elsewhere because Philadelphia banks are too small to supply it.

To sustain the first proposition the appellees called thirteen witnesses, all experienced in Philadelphia banking. Brown is president of Girard and two, MacLaren and McDowell, are vice presidents of PNB. One of the other

ten, Harris, a public banking official, has had very wide banking experience and has been teaching banking for forty years (Tr. 2277-85). Another, Jennings, after twenty years as a national bank examiner and twelve years as a deputy comptroller of the currency, became First Deputy and served as such for eight years, during which time he considered over eight hundred mergers and their effect on competition and the local banking community (Tr. 3281-99, 3404-6). Of the remaining eight one is a vice president and seven are presidents or chief executive officers of other local banks. They testified that the merger is needed in Philadelphia and is in the public interest, that it would benefit local banks and could not harm them or their customers, could not affect interest rates, would be of advantage to the community generally, would meet more of the needs of large customers and keep business in Philadelphia that now goes to New York, would create competition for banks in New York and other cities that does not now exist, and would increase competition locally. They also testified that the banking alternatives available after the merger would be ample to meet all the needs of the community, since all banks must satisfy the requirements and desires of all classes of customers within the limits of the banks' resources. They also said that the past mergers were needed and increased competition, and they made it clear that the increased resources of the merged bank are necessary to provide adequate banking service to the community.

In support of the second proposition appellees called nine witnesses. Seven of these are executive officers of large business enterprises, all but one having their main offices in the Philadelphia area: Bradshaw, Atlantic Refining Co., and also president of the Philadelphia Chamber of Commerce; Merriwether, Rohm & Haas Co.; Andrews, Triangle Publications; Amsterdam, Bankers Securities Corporation; Wilson, Sun Oil Co.; Deasy, Automotive

Rentals, Inc.; and Oakes, Pennsylvania Power & Light Co. Graves was Executive Vice President of the Philadelphia Industrial Development Corporation, a non-profit company formed by civic leaders and the city to foster industrial development; and Dilworth was Mayor of Philadelphia.

These witnesses testified that it is essential to the well-being and proper development of an industrial area that its banks should keep pace with the growth of its businesses, but that Philadelphia banks have not done so and thus are unable to serve local business adequately. They showed how the inadequate resources of Philadelphia banks have prevented the banks' full development, explained the added services that the larger New York banks are able to give, the needs of local business, medium size and large, for a substantially larger bank than any now in Philadelphia, the additional business that they would give the merged bank, with their preference for doing banking business in Philadelphia, and their present necessity for seeking accomodation in New York. They stated their unwillingness to obtain large loans, which individual New York banks can readily handle alone, by seeking to combine the lending capacity of several Philadelphia banks, and their refusal to do their banking business in a way they consider unsatisfactory. They confirmed the extent to which local business is solicited by banks in New York and elsewhere and the amount of local business that goes to New York. They indicated how much larger deposit balances they could and would maintain in a Philadelphia bank large enough to supply the needs which cannot now be furnished locally, explained why neither customers nor banks are willing regularly to make loans up to the limit of the banks' lending capacity, and why customers require a bank with a lending limit greater than their currently anticipated needs. They showed that the limited lending capacity in Philadelphia is driving banking business to other cities, why they want a bank in Philadelphia large

enough to enable them to do more banking business at home and how they expect additional banking business to be brought to Philadelphia by the merged bank.

Graves and Dilworth explained the need for the merged bank in terms of the economic and political requirements of the Delaware Valley. They elaborated on the disadvantage the city suffers by its present dependence on New York for financial accomodation.

The testimony of Harris and Jennings, supplemented by exhibits, explained the nature of bank competition and its essential difference from that engaged in by manufacturing and selling companies, showed that other mergers have had no adverse effect on small banks, that small banks can compete effectively with large banks, that competition has been keener in Philadelphia after the mergers of the last few years than before, that small banks, particularly in the Philadelphia area, have grown more rapidly than the large banks, that the largest banks in a community have difficulty in maintaining their relative size, that increased concentration in large banks is offset by the growth of smaller banks, that banks should be large enough to serve local business needs but that Philadelphia banks, lagging behind business, have failed to grow rapidly enough to do this, that banking concentration is considerably lower in Philadelphia than in most other cities, that the banking concentration which the merger would produce would not be excessive and that adequate banking competition exists and businesses are adequately served in cities with far higher banking concentration than there would be in Philadelphia after the merger. Jennings said also that in his experience increased banking concentration is the natural result of a need for additional banking accomodation. In short these two witnesses described the actual, as distinguished from the purely theoretical, results of the merger and spoke from lifelong experience in the field of banking.

The appellees likewise showed by the former president of the Ambler National Bank, Reller (Tr. 3112), and by small businessmen outside of Philadelphia, Ferraro (Tr. 3723) and Rainer (Tr. 3853), the nature of the improvement in banking service offered small businessmen after cross-county mergers with a large city bank. Those witnesses and exhibits showed that before such mergers the local banks were unable to meet local needs, that the mergers made more funds available for local loans, that service charges were a negligible factor in competition, and that the independent country banks have grown more rapidly and local competition has become more intense since the mergers than before. They also indicated the importance to small and medium size business of the greater resources of a large bank.

Appellees also showed that the proposed merger is the only feasible method of increasing adequately the lending limit and resources of the two appellees because capital-deposit ratios would impose severe penalties on stockholders if large blocks of new stock were to be sold (Tr. 3797-3801). They also showed that the proposed merger has been uniformly approved by bankers and businessmen in Philadelphia and that without it the growth of Philadelphia and its local businesses will be hampered and businessmen in the Philadelphia area will be forced to continue to seek banking accommodation in New York and elsewhere. Appellees established that unless the merger is approved the position of inferiority in which Philadelphia now finds itself will be preserved and accentuated.